No. 83-692

IN THE

Supreme Court of the United States

October Term, 1983

LOCAL UNION NO. 47, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; SOUTHERN CALIFORNIA EDISON COMPANY,

Respondents.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

Petitioner Local Union No. 47, International Brotherhood of Electrical Workers, AFL-CIO ("the Union") submits this reply to the brief of respondent Public Utilities Commission ("the PUC").

A. The PUC Seeks to Influence the Collective Bargaining Process Through Its Projection of a Reasonable Level of Wage and Benefit Increases.

The PUC disingenuously asserts that it merely seeks to fulfill its statutory mandate to set just and reasonable rates and that its projection of wage and benefit increases is necessary because it must anticipate the expenses of Southern California Edison Company ("the Company") before it can establish rates. We say the PUC is being disingenuous because it did not arbitrarily choose a level of increase that

would then be subject to change during the collective bargaining negotiations (resulting ultimately in a rate adjustment). Instead, it evaluated the quality of the respective presentations made by its staff and the Company and then projected, on the basis of its review of the evidence, that the labor escalation rate for 1983 would be 6.1% [Exh. A to Pet'n, at 31-34].

The effect of the PUC's decision is to influence the Company not to accede to any greater wage and benefit increase than that projected by the PUC. In fact, because the Company may not pass on to the consumer any increase in labor costs greater than 6.1%, the PUC's decision is more than influential; it is coercive. The disincentive to raise wages and benefits by more than 6.1% is absolute. The effect of the PUC's decision was tangibly demonstrated by the Company's announcement that it will grant no more than a 6% wage increase for 1983 [Pet'n, at 3]. In fact, the PUC argues that it "has merely forecasted what is reasonable in terms of ratemaking" [PUC Brief, at 13]. The PUC's use of the adjective "reasonable" betrays its coercive intent.

In its attempt to distinguish *Oil, Chemical & Atomic Workers v. Arkansas Louisiana Gas Co.*, 332 F.2d 64 (10th Cir. 1964); *General Electric Co. v. Callahan*, 294 F.2d 60 (1st Cir. 1961); and *Grand Rapids City Coach Lines v. Howlett*, 137 F. Supp. 667 (W.D. Mich. 1955), the PUC argues that its projection of a level of reasonable increase in wages and benefits is not coercive. The PUC concedes these cases all involve intrusive state action having a coercive object. But the PUC's projection of a level of reasonable increase in wages and benefits is even more coercive than that found in the cited cases. *Oil, Chemical & Atomic Workers* involved only a recommendation for the settlement of differences; *General Electric Co.* involved only the issuance of a non-binding report identifying the party re-

sponsible for the impasse in negotiations; and *Grand Rapids* involved the issuance of a non-binding recommendation to the parties to the labor dispute. Here, the PUC's projection for ratemaking purposes carries with it the power of the purse. Should the Company disregard the projection, it will be unable to recover any excess labor costs, its rate of return will drop, and the amount of the shareholders' dividends will be reduced. The PUC's projection of the level of reasonable increase in wages and benefits, and the decision as to utility rates that results therefrom, is, therefore, more than a recommendation; it is a binding determination with direct fiscal consequences.

B. The Decision of the PUC Makes No Accommodation to the Collective Bargaining Process and Is Contrary to Past PUC Decisions Which Require That It Abstain From Pre-Collective Bargaining Involvement in Employee Wages and Benefits.

Despite its current bold position that the power to make rates prevails over the collective bargaining process, the PUC has in the past recognized its obligation to abstain from pre-collective bargaining involvement in employee wages and benefits. But the PUC has apparently recently disregarded its traditional accommodation of the collective bargaining process to its ratemaking authority. And it has done so without any explanation of the reasons for the change.

In *Request of Hospital & Service Employees Union, Local 399*, 81 C.P.U.C. 302 (1976), the union sought an order from the PUC enforcing the prevailing wage provision of Cal. Pub. Util. Code § 465. The PUC denied the relief requested by the union and reiterated its traditional holding that "in the absence of statutory authority . . . , the Commission does not have power to regulate contracts by which a utility secures labor, materials, and services for the con-

duct of its business, except where such contracts result in disabling the utility from performing its public duty." *Id.*, at 305 (citations omitted). The exception to the rule against regulation of labor contracts is a limited one; it permits retrospective, not pre-negotiation review; and only where the contract results in disabling the utility from performing its public duty.[1]

In *Pacific Gas & Electric Co.*, 4 C.P.U.C.2d 347 (1980), a case involving an application for rate increase, the PUC considered and ruled on two issues involving collective bargaining: employee utility service discounts and union work rules. With respect to the employee discounts, the PUC held:

> "Employee discounts are part of a total compensation package embodied in a collective bargaining agreement between PG&E [the company] and IBEW [the union]. *Such agreements are favored by federal and state law.* (29 U.S.C. §§ 151, *et seq.*; Labor Code § 923). There is no evidence in this record which would support a finding that the total compensation package embodied in the collective bargaining agreement is unreasonable." *Id.*, at 355 (emphasis added).

And with respect to the union work rules, the PUC held:

> "The union work rules are part of the collective bargaining agreement. . . . *As indicated, the collective bargaining agreement is consonant with federal and state policy. Assuming the PUC has jurisdiction to disregard the agreement for ratemaking purposes, a strong showing of unreasonableness should be required before it does so.* The staff made no such showing in this proceeding." *Id.*, at 357 (emphasis added).

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[1]The PUC's authority to review labor contracts retrospectively is not at issue here. The Union assumes for the sake of argument, but does not concede, that such authority exists.

Thus, the PUC itself has recognized, until recently, that it must accommodate itself to federal and state labor policy. Although the PUC has left open the possibility that it will exercise jurisdiction to reject a collectively bargained agreement, it would do so only in retrospect, upon a "strong showing of unreasonableness."

Even where the PUC has expressed doubt as to the wisdom of a policy arrived at through collective bargaining, it has simply expressed its concerns and notified the parties that it will continue to review the impact of the policy on service and rates. In *General Telephone Co.*, 4 C.P.U.C.2d 428, 518 (1980), the PUC rejected a staff recommendation that a collective bargaining agreement be modified, noting, "[w]e have no desire to place our finger on either end of the delicate balance in labor-management negotiations." The PUC also noted that it would continue to examine the effect of the employee transfer policy involved in order to determine whether the policy "unreasonably" affects rates and service.

In short, the PUC has moved in this case from its traditional accommodation of federal and state labor policy through retrospective review of collective bargaining agreements under an "unreasonableness" standard, to a projection of what it will accept as reasonable. By its unexplained shift in policy and procedure, the PUC has preempted meaningful negotiations between the Company and the Union concerning employee wages and benefits.

C. The Collective Bargaining Process Is Subject to Comprehensive Federal Regulation.

The PUC offers a twisted and erroneous interpretation of the decision of the Ninth Circuit Court of Appeals in *International Brotherhood of Electrical Workers, Local Union No. 1245 v. Public Service Commission*, 614 F.2d 206 (9th

Cir. 1980). The PUC argues this decision stands for the proposition that public utility regulation is a matter of local concern and, therefore, not subject to federal preemption under the National Labor Relations Act. This argument betrays a misconception of the issue in this case and the holding in *International Brotherhood of Electrical Workers*.

The issue in this case is not public utility regulation; it is the authority of the PUC to invade the labor-management relations sphere already regulated by federal and state law. In *International Brotherhood of Electrical Workers, supra*, the union sought to invoke the federal court's jurisdiction to resolve the union's claim that employee utility rate discounts are a mandatory subject of collective bargaining under the National Labor Relations Act, with the consequence that state regulation of the discounts is preempted. 614 F.2d at 208. The court held that it did have jurisdiction to resolve the union's claim, *id.*, at 209-11, but decided that abstention was appropriate only because possibly determinative state law issues were then being resolved in a state court action. *Id.*, at 213. Nowhere in the decision does the court hold that employee utility rate discounts are a matter of local concern and, therefore, not subject to the preemption doctrine.[2]

Finally, the collective bargaining process in which wages and benefits are negotiated between employers and unions is central to federal labor policy and regulation of that process under the National Labor Relations Act is comprehensive. For this reason, federal law does not permit the use of state law to regulate employee wages and benefits. *See*

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[2]In fact, the court in *International Brotherhood of Electrical Workers* adverts to the conclusion of the state trial court that the Public Service Commission of Nevada infringed upon an area of labor-management relations preempted by the federal government. *International Brotherhood of Electrical Workers, supra*, 614 F.2d at 213 n.3.

Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616, 635-37 (1975) (federal law does not admit the use of state antitrust law to regulate union activity).

D. This Case Is Not Moot.

The PUC argues that the dispute between the parties has come to an end. That argument betrays an insensitivity to the collective bargaining process and a failure to recognize that the PUC's decision continues to affect the Union's present interests.

The PUC correctly asserts, at page 15 of its response brief, that the Union and the Company executed a collective bargaining agreement on May 10, 1983, to be effective January 1, 1983. But during those negotiations the Company refused, because the PUC had allowed only a 6.1% "labor escalation rate" ("wage increase"), to grant wage increases above that amount (Pet'n, at 3).

Moreover, by adverting to the date of execution of the collective bargaining agreement, the PUC has told only one-half of the story. The wage agreement between the Union and the Company expires on December 31, 1983. The Union and the Company are currently negotiating toward a new agreement, but they are doing so under a disability: the PUC's decision in this case projects a reasonable level of wage increase not only for 1983; it also establishes a formula, using base data from its 1983 projection, through which the 1984 wage increase is to be calculated [*see* "*Adopted Attrition Rate Adjustment Procedure: Labor and Nonlabor Expenses*," PUC Decision, at 170-71].[3] Thus, the PUC's decision has a tangible and continuing effect upon

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[3]For the Court's convenience, copies of pages 170-71 of the PUC Decision are appended to this brief as Exhibit "A."

the parties as they now begin to negotiate wages for calendar year 1984. In addition, were the Court to conclude that the PUC impermissibly hindered the federally preempted and protected collective bargaining process, the current negotiations between the Union and the Company would probably be expanded to include discussion of a retroactive wage adjustment for 1983.

Finally, assuming *arguendo* that the PUC's decision has no continuing effect upon the parties, this case presents an issue "capable of repetition, yet evading review." In *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974), the employer challenged the conduct of New Jersey officials in awarding public assistance to employees engaged in an economic strike. The employer argued such conduct interfered with the federal labor policy of free collective bargaining. *Id.*, at 119. The respondent union in *Super Tire* raised the claim of mootness, based upon the termination of the strike and the execution of the new collective bargaining agreement. The Court rejected that claim, noting that if the Court were to condition Supreme Court review on the existence of an economic strike, the case would present an issue "capable of repetition, yet evading review." *Id.*, at 125. Thus, the Court held that it is sufficient for the litigant to show "the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest." *Id.*, at 125-26. "Otherwise, a state policy affecting a collective-bargaining agreement . . . could be adjudicated only rarely. . . ." *Id.*, at 126.

Like the economic strikes which result from unsuccessful collective bargaining negotiations, the collective bargaining agreements which result from successful negotiations should not preclude judicial review of important legal issues underlying the disputes. Like economic strikes, successful col-

lective bargaining negotiations are typically concluded in far less time than it takes to process a legal action through all stages of judicial review. Were the Court to conclude that the Union must choose either to cede its legal position by signing an agreement or to live without an agreement pending full review by the judiciary, the result would be destructive not only of the relationship between the union and its members, who would be required to go without the protections of the collective bargaining agreement or improvements therein, but of the relationship between the union and the employer, who would be dependent on the swift processing of the legal action for the industrial peace and stability which the National Labor Relations Act was designed to promote.

E. The PUC Presents an Erroneous Description of the Proceedings Below.

The PUC mistakenly characterizes the Union's petition for a writ of certiorari in this case as directed to the California Supreme Court. But that court issued no decision; it simply denied the Union's petition for a writ of certiorari. Thus, the Union's petition is properly directed to the PUC, the administrative body which issued the most recent decision on the merits in this case.

The PUC then argues, at page 16 of its response brief, that because its decision has been upheld by the highest court of the state, the decision is presumed to be valid. Again, the California Supreme Court refused to grant the Union's petition for a writ of certiorari [Exh. C to Pet'n]; it has done nothing to warrant according presumptive validity to the PUC's decision below. Contrary to the PUC's claim, the California Supreme Court has not "upheld" the PUC's decision. *See People v. Triggs*, 8 Cal.3d 884, 890-91 (1973) ("our refusal to grant a hearing in a particular

case is to be given *no* weight. . . .").

Finally, the PUC argues that the Union failed to comply with Rule 21.2(h) concerning "pertinent quotation of specific portions of the record." However, neither the PUC, in its order denying rehearing [Exh. B to Pet'n], nor the California Supreme Court, in its denial of the petition for a writ of certiorari, issued any written decision directly responsive to the Union's preemption argument. Thus, there was no decision worthy of quotation. The PUC does not claim that the Union failed to raise the preemption argument below, but argues the Union should have quoted portions of the record showing the issue was indeed raised. Should the Court require such proof that the issue was raised below, we append, as Exhibits "B" and "C" to this brief, respectively, copies of the Union's application to the PUC for rehearing and the Union's petition for a writ of certiorari filed with the California Supreme Court.

Conclusion.

For these reasons, a writ of certiorari should issue to review the decision of the Public Utilities Commission of the State of California.

DATED: December 9, 1983.

Respectfully submitted,

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had included the interest deduction in the financial attrition component as did staff, its financial attrition recommendation would have been approximately $8.1 million lower. However, the fixed component of attrition, which includes income tax expense, would have been higher by $8.1 million thereby offsetting the financial attrition reduction.

C. Adopted Attrition Rate Adjustment Procedure

1. Advice Letter Procedure

Our adopted attrition rate adjustment (ARA) procedure will not consider changes in sales and revenue levels because our adopted ERAM will compensate for such changes. The labor and nonlabor costs which we adopt for test year 1983 will be adjusted to reflect the most current rate of inflation of 1983 and then be escalated by appropriate estimates of inflation factors as discussed in the following paragraphs on indexing. We will not adopt a growth factor; instead, we will postulate that any growth or increase in activity levels will be offset by increased productivity and efficiency.

The order will provide that Edison may make an advice letter filing, no later than October 31, 1983, showing the additional revenue requirement calculated for the attrition year 1984. The revenue requirement will be determined in accordance with the following procedure, summarized in Appendix E, using figures reflected in, or compatible with, the adopted results of operations for 1983 shown in Table X-2.

2. Labor and Nonlabor Expenses

Our premise for establishing an indexing formula for developing attrition year labor and nonlabor expenses is that we should use the most current estimates of inflation for

1984 in calculating the attrition allowance. Consistent with this premise, the 1983 expense base upon which we project 1984 expenses should also reflect the most up-to-date information regarding inflation for 1982 and 1983. Failure to adjust the expense base might otherwise lead to over- or underestimates of reasonable expenses in 1984.

We therefore will adjust the labor and nonlabor expense base adopted in this decision for 1983, which are given in Appendix E, to reflect the actual inflation which occurs in 1982 and the most current 1983 annual escalation rates as projected by DRI in its fall 1983 forecast. We will apply the following indexing formula:

$$\text{Attrition Allowance} = (A \times \frac{B}{C} \times D)^* - A \quad (1 - \frac{B}{C})$$

A = The 1983 expense base subject to escalation as adopted in this decision (CPUC jurisdictional amount).

B = The compounded factor of (one plus the 1982 escalation rate) multiplied by (one plus the 1983 escalation rate), developed from the fall 1983 DRI forecast.

C = The compounded factor of (one plus the 1982 escalation rate) multiplied by (one plus the 1983 escalation rate), adopted in this decision.

D = The 1984 escalation rate developed from the fall 1983 DRI forecast.

*Appropriate uncollectible and franchise factors shall be included.

In determining the labor expense component of attrition, Terms B and D will be based on the fall 1983 DRI projections of the Consumer Price Index (Urban) of the applicable years. For the nonlabor expense component of attrition, Terms B and D will be based on the fall 1983 DRI projections of our adopted modified producer price index and

consistent with the weighting developed in Section IV.C of this opinion.

Our adopted labor base includes labor-related pensions and benefits. Our adopted nonlabor base will exclude those items which are not subject to nonlabor escalation, including labor-related pensions and benefits and amortized expenses.

3. Capital-Related Costs

The capital-related costs treated in this section include ad valorem taxes, income taxes, and depreciation expenses, as well as

EXHIBIT B.

Application for Rehearing.

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Before the Public Utilities Commission of the State of California.

In the Matter of the Application of Southern California Edison Company for Authority to Increase Rates Charged by It for Electric Service.

A 61138. Decision 82-12-055.

Notice is hereby given the Public Utilities Commission of the State of California ("PUC") of the application for rehearing, pursuant to Public Utilities Code § 1731, of Interested Party International Brotherhood of Electrical Workers, Local 47 ("Local 47") in the matter of the Application of Southern California Edison Company ("SCE") for authority to increase rates charged by it for electric service.

The Application for Rehearing is based on the following grounds:

1. The PUC has erroneously and unlawfully established projected escalation rates for wage and other employee benefits in its decision in this matter, in that:

a. The PUC's projection of labor cost increases prior to the negotiation of collective bargaining agreements covering the term of the rate increase is a violation of its powers under California law because such action constitutes an imposition of, and limitation upon labor rate and benefit increases by a governmental regulatory agency; and

b. The inclusion of projected labor rate and benefit increases is contrary to PUC rate application decision precedent.

2. The PUC lacks jurisdiction to suggest wage rates because its decision intrudes upon the rights and freedom of the collective bargaining parties and is, therefore, preempted by federal labor law.

This application shall be supported by a memorandum of points and authorities, to be submitted on or before January 18, 1983. For the foregoing reasons, the PUC Decision with respect to wages and other employee benefits should be modified to eliminate reliance upon percentage increases prior to the negotiation of these terms by SCE and the labor organizations that represent SCE's employees.

Dated: January 11, 1983.

Respectfully submitted,
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EXHIBIT C.

Petition for Writ of Certiorari.

In the Supreme Court of the State of California.

Local Union No. 47, International Brotherhood of Electrical Workers, AFL-CIO, Petitioner, v. Public Utilities Commission of the State of California, Respondent, and Southern California Edison Company, Real Party in Interest.

Local Union No. 47, International Brotherhood of Electrical Workers, AFL-CIO (Union) petitions the Court to review by writ of certiorari the decision in case no. 82-12-055 of the Public Utilities Commission of the State of California (Commission), and in support of this petition alleges the following:

[PARTIES]

1. The Union is an unincorporated association functioning as a labor organization.

2. The Commission is a public agency of the State of California which regulates utilities in the State.

3. Southern California Edison Company (Company) is a privately owned corporation, operating facilities within and outside the State of California for the purpose of providing electricity in the State of California. The Company is a utility regulated by the Commission and is an employer in an industry affecting interstate commerce in the United States.

[PROCEEDINGS BELOW]

4. On September 15, 1981 the Company tendered for filing with the Commission its notice of intention to file a general rate increase application for authority to increase its base rates for electrical service to its retail customers, and on December 18, 1981 the Company filed an application with the Commission for authority to raise its base rates

effective January 1, 1983.

5. Hearings were held by the Commission on the Company's application.

6. Following the hearings, an interim opinion and order was rendered by the Commission on December 13, 1982 (Decision), and was numbered 82-12-055.

7. Contrary to past practice in which the Commission did not estimate wage increases the Company might be obligated to pay to employees represented by the Union, the Decision of the Commission established, among other things, a 6.1% "labor escalation rate" (wage increase) for the year 1983 for the employees of the Company represented for purposes of collective bargaining by the Union. A copy of pages 31-34 of the Decision, which discuss the "Labor Escalation Increases," are attached hereto as Exhibit A and by reference incorporated herein.

8. On January 11, 1983, the Union filed with the Commission an application for rehearing, in which the Union alleged:

a. The Commission erroneously and unlawfully established projected escalation rates for wage and other employee benefits, in that

i. The Commission acted in excess of its powers by regulating labor rate and benefit increases, and

ii. The inclusion of projected labor rate and benefit increases is contrary to Commission precedent; and

b. The Commission lacks jurisdiction to suggest wage rates because its Decision intrudes upon the rights and freedom of the collective bargaining parties and is preempted by federal labor law.

9. On March 16, 1983, the Commission issued an order (a copy of which is attached hereto as Exhibit B and by reference incorporated herein), denying the Union's application for rehearing.

[UNION'S BENEFICIAL INTEREST]

10. The Union was an intervener in the Commission's hearings on the Company's application, and the Union is certified by the National Labor Relations Board as the exclusive representative for purposes of collective bargaining of certain of the employees of the Company. In addition, the Union is presently engaged in collective bargaining with the Company for a collective bargaining agreement to be effective in 1983, and the Company is taking the position during these negotiations that it will not grant a wage or benefit increase to its employees in an amount greater than 6% (which is the approximate amount projected by the Commission for 1983).

[BASIS FOR RELIEF]

11. The Decision of the Commission is unlawful and beyond the Commission's jurisdiction for the reasons submitted to the Commission in the Union's application for rehearing, as set forth in paragraph 8, above.

WHEREFORE, petitioner prays that:

1. This Court issue a writ of certiorari directing respondent Public Utilities Commission of the State of California to certify fully to this Court at a time and place specified by an order of the Court, a transcript of the record and proceedings in Decision No. 82-12-055, and requiring respondent in the meantime to desist from further proceedings in the matter;

2. Upon review of the Commission's Decision, correct the Decision to delete reference to wage increases;

3. Petitioner recover the costs of this action, including attorneys fees pursuant to California Code of Civil Procedure § 1021.5; and

4. The Court grant such other and further relief as it deems proper.

DATED: April 11, 1983.

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